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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ...71-1384

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

against

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ as Trustees of the Property of the Penn Central Transportation Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 26, 1972.

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GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, as Trustees of the Property of the Penn Central Transportation Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered January 27, 1972, which dismissed the appeal of petitioner from an order of the United States District Court for the Eastern District of Pennsylvania filed September 29, 1970.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and is set out in the Appendix to this

Petition commencing at page 1a. The judgment of the Court of Appeals is set out in the Appendix at page 13a. The orders of the District Court (Order Nos. 63 and 72) are set out in the Appendix commencing at page 15a.

Jurisdiction

The judgment of the Court of Appeals was entered January 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals err in holding that the principles governing questions of standing enunciated by this Court in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) do not apply to railroad reorganization proceedings under Section 77 of the Bankruptcy Act?

2. Whether the New Haven Committee, an active participant in pre-bankruptcy litigation against Penn Central Transportation Company, has standing to protect the fruits of its litigation in the Penn Central Transportation Company reorganization proceedings?

3. Whether the equitable owners of a claim against a railroad in reorganization under Section 77 of the Bankruptcy Act have standing to appeal from an order adversely affecting the value of the claim?

4. Whether the Court of Appeals was correct in holding that the interests represented by the New Haven Committee were "derivative" and that persons having a "substantial derivative interest" in a railroad reorganization proceeding have no right to be heard and to appeal?

Statutes Involved

The statutes involved in this case are: Bankruptcy Act § 77(b) and § 77(c)(13), 11 U.S.C. § 205(b) and 205(c)(13). Those portions of the statutes that are most pertinent to this Petition are as follows:

Section 77(b) of the Bankruptcy Act
11 U.S.C. § 205(b)

> ". . . The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Section 77(c)(13) of the Bankruptcy Act
11 U.S.C. § 205(c)(13)

> ". . . The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene."

Statement of the Case

Petitioner, The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Com-

mittee (the "New Haven Committee") is the representative of the First Mortgage Bondholders of The New York, New Haven and Hartford Railroad Company (the "New Haven"), a Debtor in reorganization.*

The New Haven Committee appealed to the Court of Appeals for the Third Circuit from Order No. 63 of the District Court for the Eastern District of Pennsylvania (the "Reorganization Court") (App. 15a) as amended by Order No. 72 (App. 17a). Order No. 63 was entered without opinion in proceedings for the reorganization of Penn Central Transportation Company ("Penn Central") under § 77 of the Bankruptcy Act (11 U.S.C. § 205). The order resulted from the petition of the Trustees of the property of Penn Central (the "Penn Central Trustees") requesting authority to affirm a Memorandum of Intent with the New York Metropolitan Transportation Agency (the "MTA") and the Connecticut Transportation Authority (the "CTA"). The Memorandum provided for the transfer to MTA and CTA of property which had been transferred to Penn Central by the New Haven on December 31, 1968 pursuant to orders of the Interstate Commerce Commission and the United States District Court for the District of Connecticut acting as the New Haven Reorganization Court.**

Specifically, Order No. 63 permitted the sale of the New Haven's main line between Woodlawn Junction and the New York State border at Port Chester, New York to MTA and the transfer, by lease for a term of sixty years, of the New Haven line from the New York-Connecticut

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* The New Haven is and has been a debtor in reorganization under Section 77 of the Bankruptcy Act since July 7, 1961.

** A description of the transaction is set forth in *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The proceedings there remanded by this Court to the Interstate Commerce Commission ("Commission") have to this date not been set down for hearing by the Commission.

boundary line to the cities of New Haven, Waterbury, Danbury and New Canaan, to CTA. The Penn Central Trustees requested that the transfers be made free of the lien of a Divisional First Mortgage dated as of December 31, 1968, securing the issue of Penn Central 5% Divisional First Mortgage Bonds due January 1, 1994 delivered to New Haven in connection with the December 31, 1968 transfer of the New Haven properties.

The New Haven Committee and the New Haven Trustee appeared before the Reorganization Court at a hearing held on September 23, 1970 and objected to the transfer of the properties free of the first mortgage lien unless the Penn Central Trustees deposited with the Indenture Trustees under the divisional mortgage, not merely the cash received by the Penn Central Trustees, but the fair value of all the consideration received in any form. As noted by the Court of Appeals, the New Haven Trustee compromised and withdrew his objection (App. 3a fn. 4).* The New Haven Committee did not join in the compromise and when the Reorganization Court promptly entered Order No. 63, the New Haven Committee prosecuted its appeal to the Court of Appeals.

Subsequently, the Penn Central Trustees moved in the Court of Appeals to dismiss the appeal on the ground that the New Haven Committee had no standing to bring the

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* The New Haven Trustee had not sought authority from the New Haven Reorganization Court to enter its compromise nor did he seek, or ever receive, approval for this course of conduct. This was not the first time in the long history of the New Haven reorganization proceedings that the New Haven Committee pressed on to oppose agreements made by the New Haven Trustee without the prior approval of the New Haven Reorganization Court. See *New Haven Inclusion Cases, supra,* at 410-11 fn. 46; *New York, N.H. & H.R.R. First Mortgage Bondholders Committee* v. *United States,* 289 F.Supp. 418 (S.D.N.Y. 1968); *New York, N.H. & H.R.R. First Mortgage Bondholders Committee* v. *United States,* 305 F.Supp. 1049 (S.D.N.Y. 1969).

appeal. The motion was argued before a panel of the Court of Appeals,* which then did not determine the motion but continued the motion "for disposition by the panel of this Court which hears argument on the merits in this case."

The contention of the New Haven Committee on the appeal was that the Reorganization Court, although establishing a procedure for determining the extent to which the consideration deposited with the Indenture Trustee was not equal to the value of the entire consideration, erred in ordering (in Paragraph 4, App. 16a) that no matter how far below the fair market value of all elements of consideration the cash consideration will be proven to be,** the amount deposited with the Indenture Trustee will not exceed the cash consideration received and to be received from MTA and CTA, and in permitting the sale without provision for the deposit with the Indenture Trustee of the fair value of the property.

In its opinion, the Court of Appeals stated:

> "Paragraph 4 of the order, however, appears to limit the Penn Central Trustees' obligations to the New Haven Trustee under the Divisional First Mortgage." (App. 4a)

But the Court of Appeals granted the motion of the Penn Central Trustees to dismiss, concluding that the New

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* Argument was heard on April 19, 1971 by Circuit Judges Seitz, Adams and Rosenn.

** It seemed evident that the cash consideration received or to be received was not a full measure of the fair value of the property. The property involved in the transfer to MTA was valued (as of December 31, 1965) at $11.7 million by the Interstate Commerce Commission in the proceedings transferring the property from the New Haven to Penn Central. Under the Memorandum approved by Order No. 63, MTA paid only $7.2 million in cash for the property. In addition, Penn Central received trackage rights and a subsidy relieving it of operating losses.

Haven Committee lacked standing to prosecute the appeal (App. 5a-6a).*

The Court of Appeals, in denying standing to the New Haven Committee, first held that the principles enunciated by this Court in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) and *Flast* v. *Cohen,* 392 U.S. 83 (1968) were "manifestly not intended to apply to a railroad reorganization proceeding" (App. 6a fn. 12). It then held that, although the interest of the New Haven bondholders in assuring that the terms of the mortgage are complied with was "substantial" (App. 7a-8a), their interest was "essentially derivative" from the claim of the New Haven Trustee (App. 9a fn. 17) and that the language and policy of Section 77 compelled the conclusion that "Standing to appeal an order of a railroad reorganization court requires a direct personal interest in the subject matter of the order and a showing that the appellant is aggrieved or prejudiced by the order" (App. 8a, fn. 16).

The question as to how "direct" an interest in the subject matter is required to confer standing is of general importance. Especially since the Court of Appeals recognized that the New Haven Committee had a substantial interest in the subject matter of the order and was aggrieved and prejudiced by it.

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* The Court of Appeals stated: "In view of our disposition of this appeal, we need not decide whether there is merit in the New Haven Committee's position . . ." (App. 3a fn. 4).

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in significant respects which result in petitioner being deprived of the opportunity to be heard. Important questions involving standing and Section 77 of the Bankruptcy Act are presented.

1. The Court of Appeals erroneously limited the principles enunciated by this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970) and erroneously interpreted Section 77 of the Bankruptcy Act.

This Court has recently taken firm steps to insure that those who have an interest which is of the type a statute was designed to protect shall not be denied their day in Court because of an absence of standing. See *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp.*, 397 U.S. 315 (1970); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Hardin* v. *Kentucky Utilities Company*, 390 U.S. 1 (1968).

In *Data Processing Service* v. *Camp, supra*, this Court declared that only two questions were required to be answered affirmatively for a plaintiff to have standing. In this Court's language:

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." (397 U.S. at 152)

The second question was put as follows:

> "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (397 U.S. at 153)

As to the first question, the New Haven Committee alleged that Order No. 63 caused the bondholders economic injury and the Court of Appeals recognized the reality of the injury claimed. It stated:

> "Thus the New Haven bondholders represented by the Committee have a lien on substantially all of the assets held by the New Haven Trustee, including the Penn Central 5% Divisional First Mortgage Bonds. These New Haven bondholders, therefore, have a substantial derivative interest in assuring that the terms of the mortgage which secures these bonds are complied with. Put in the simplest terms, the more cash that is deposited with the Mortgage Indenture Trustees when former New Haven assets are sold, the more likely it is that the Penn Central's obligations to the New Haven Trustee will be met, and therefore the more likely it is that the New Haven Committee bondholders will have their claims against the New Haven satisfied." (App. 7a-8a)

It seems obvious that the realistic interest sought to be protected by the New Haven Committee is "arguably within the zone of interests to be protected" by Section 77 of the Bankruptcy Act. However, instead of following the tests established by this Court in *Data Processing Service* v. *Camp, supra,* the Court of Appeals, in a footnote, held the principles declared in the *Data Processing Case* and in *Flast* v. *Cohen, supra,* to be inapplicable to Section 77 of the Bankruptcy Act (App. 6 fn. 12). In respect of the language of this Court, it stated:

> "This language, however, was manifestly not intended to apply to a railroad reorganization proceeding, where Congress has enacted a specific statutory scheme which outlines the parties entitled to participate and provides a means by which an 'interested party' may be permitted to intervene . . ." (App. 6 fn. 12)

The "specific statutory scheme" referred to by the Court of Appeals is contained in § 77(c)(13) of the Bankruptcy Act, as follows:

> "The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene."

While § 77(c)(13) specifically declares some persons to be "interested", it also recognizes that persons other than those listed may be "interested". As to the latter, the section attempts no limitation, but suggests a procedure of formal intervention.* The Court of Appeals has concluded that only those persons specifically listed in § 77(c)(13) have standing and the right to be heard. This conclusion simply contradicts the holding in the *Data Processing Case* that persons who allege an injury in fact and who seek to protect an interest "arguably within the zone of interests to be protected or regulated", have standing and the right to be heard.

There is no authority for the holding of the Court of Appeals that § 77(c)(13) was intended as an exclusive list of those who have a right to be heard and none was cited by the Court of Appeals. Generally, the Bankruptcy Laws have been liberally interpreted to allow full participation in reorganization proceedings by interested persons. See *Horowitz* v. *Kaplan*, 193 F. 2d 64 (1st Cir. 1951), cert. denied, 342 U.S. 946 (1952).

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* The Court of Appeals recognized the rule that "the failure to formally intervene will not preclude an appeal if the appellant in fact had a *right* to be heard in the reorganization proceedings." (App. 6a fn. 11) (emphasis in original). See *Horowitz* v. *Kaplan*, 193 F. 2d 64 (1st Cir. 1951), cert. denied, 342 U.S. 946 (1952).

So long as "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution",* the right to be heard should be recognized. There is no valid policy reason for the promulgation of a more limited rule in railroad reorganization proceedings.

2. The Court of Appeals erroneousy limited the definition of a "creditor" under Section 77 of the Bankruptcy Act and arbitrarily denied the New Haven Committee the opportunity to be heard.

Having concluded that § 77(c)(13) of the Bankruptcy Act prevented application of the general principles governing standing in the federal courts, the Court of Appeals then went on to discuss the question of whether the New Haven Committee had standing because the bondholders represented by it were "creditors" under § 77 of the Bankruptcy Act.

Section 77(b) contains the following definitions:

> "The term 'creditors' shall include, for all purposes of this section *all holders of claims of whatever character against the debtor or its property,* whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' *includes debts,* whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock) *liens, or other interests of whatever character.*" (emphasis added)

The broad definitions contained in § 77(b) clearly reflect the intention of Congress to permit any person likely

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* *Flast* v. *Cohen,* 392 U.S. 83, 101 (1968). Here, the New Haven Committee represents those persons who have the largest financial interest in the outcome of these proceedings.

to be economically affected by the reorganization proceedings to be considered as a "creditor". The Court of Appeals, in effect, recognized that the interest of the New Haven Committee was such that it was obviously the "holder of claims". It held, however, that the claims were not "against the debtor or his property" but were "essentially derivative" and that "Congress did not intend that those with simply a derivative interest in a railroad reorganization proceeding have a right to be heard and to appeal" (App. 8a, 9a).

Although limiting its enunciation to a footnote, the Court of Appeals promulgated and applied the following general principle:

> "Standing to appeal an order of a railroad reorganization court requires a direct personal interest in the subject matter of the order and a showing that the appellant is aggrieved or prejudiced by the order." (App. 8a fn. 16)

It is submitted that this general declaration is unworkable, unduly restrictive and entirely dependent upon the placing of arbitrary "labels" upon the interests sought to be protected. This Court should grant this petition to consider whether the requirements for standing imposed by the Court of Appeals reflect the intention of Congress.

The harshness of the Court of Appeals' rule is dramatized in the instant case. It is apparent that the New Haven Committee has shown that it "is aggrieved or prejudiced by the order" and that ought to be sufficient to recognize standing as an interested party. But the Court of Appeals has labeled the substantial interest of the New Haven Committee as "derivative" and therefore not a "direct personal interest." The Court of Appeals stated:

> "The lien which these New Haven bondholders once had on the New Haven property . . . was explicitly

> released when this property was transferred to Penn Central on December 31, 1968. Furthermore, the lien which the New Haven bondholders have against the proceeds of the sale to Penn Central does not give them a claim against the Penn Central. The claim against the Penn Central for these proceeds is held by the New Haven Trustee; the New Haven bondholders have a claim only against the amounts which the New Haven Trustee receives from Penn Central." (App. 8a-9a)

The New Haven Trustee is, however simply a fiduciary appointed by a court to conduct proceedings in reorganization. No one can pretend that the New Haven Trustee has a *personal* interest. At best, in traditional trust terms, the New Haven Trustee has legal title while the bondholders hold the equitable title. An equitable interest is not a "derivative interest". The equitable owners are the ones who suffer the injury imposed by the order. This Court has recognized that it is the bondholders who hold the essential rights determined in the long history of this litigation. In *New Haven Inclusion Cases, supra,* this Court said:

> "Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. *We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens.*" (399 U.S. at 489-90) (emphasis added)

The New Haven Committee appeared in the Penn Central proceedings in order to insure that in the course of a "liquidation and per-parcel sale" of property that was theirs by virtue of their mortgage liens, the property should not be transferred without a deposit with the Indenture Trustee of the fair value of the consideration received on such a sale. The Court of Appeals' decision

holds that the bondholders have no standing any longer to protect the rights accorded by this Court.

The Court of Appeals has created rigid and arbitrary requirements for the determination of standing under § 77 of the Bankruptcy Act. The decision of the Court of Appeals has wide and important ramifications in the administration of an important statute and important judicial proceedings and this Court should review the decision of the Court of Appeals.

CONCLUSION

For the reasons above stated, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 26, 1972.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,503

In the Matter of:
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 9, 1971

Before VAN DUSEN and ROSEN, *Circuit Judges*,
and LAYTON, *District Judge*

OPINION OF THE COURT

(Filed January 27, 1972)

VAN DUSEN, *Circuit Judge*.

This case involves an appeal by the New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee ("the New Haven Committee") from an order of the District Court for the Eastern District of Pennsylvania sitting as a Reorganization Court In the Matter of Penn Central Transportation Company, Debtor. The order in dispute, Order No. 63, resulted from a peti-

tion filed on September 11, 1970, by the Penn Central Trustees, requesting authority to affirm a Memorandum of Intent with the New York Metropolitan Transportation Authority ("the MTA") and the Connecticut Transportation Authority ("the CTA"). This Memorandum provided for the sale to the MTA of the Penn Central line between Woodlawn Junction and Port Chester in New York (a line formerly owned and operated by the New York, New Haven & Hartford Railroad Company ("the New Haven"))[1] and a 60-year lease to the CTA of the Penn Central lines extending from the New York-Connecticut boundary to the Connecticut cities of New Haven, Waterbury, Danbury and New Canaan (lines also formerly owned and operated by the New Haven).[2] A hearing on the Trustees' petition was held on September 23, 1970, by the Penn Central Reorganization Court. The Trustee of the New Haven and the New Haven Committee appeared at this hearing to object to the conveyances contemplated by the Memo-

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1. Substantially all of the assets and operations of the New Haven were sold to the Penn Central on December 31, 1968. This sale had been required by the Interstate Commerce Commission as a condition of its approval of the merger between the Pennsylvania Railroad and the New York Central Railroad into the Penn Central. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

2. Under the terms of the Memorandum, Penn Central was to receive $7.2 million cash from the MTA and a cash annual rental from the CTA equal to 5% of the aggregate salvage value of the leased lines. (The CTA also was given an option to purchase the leased lines during the term of the lease at a price equal to their salvage value when the option is exercised.) The Memorandum also provided that Penn Central would retain free trackage rights over the transferred lines for 60 years and would receive a minimum cash toll of $2.9 million per year for the use by the MTA and the CTA of the Penn Central track between Woodlawn Junction and Grand Central Station (track not formerly owned by the New Haven). Provision was also made for a service contract under which Penn Central would continue to operate the transferred lines in exchange for an annual management fee of $100,000, plus reimbursement by the MTA and the CTA for any deficits Penn Central incurred in these operations.

randum unless the Penn Central Trustees deposited with the Indenture Trustees of a Penn Central Divisional First Mortgage[3] an amount in cash equal to the fair value of the properties transferred, not simply the cash which Penn Central was to receive in direct payment for the transfers.[4] After some discussion, the hearing was recessed to allow the parties to effect a compromise.

A settlement agreement reached between all the participants except the New Haven Committee was reflected in Order No. 63 of the Penn Central Reorganization Court, dated September 29, 1970. This order authorized the Penn Central Trustees to affirm the Memorandum, but reserved jurisdiction to determine the valuation and disposition of the consideration to be re-

3. When the Penn Central purchased the assets and operations of the New Haven on December 31, 1968, a part of the consideration paid to the New Haven Trustee was an issue of Penn Central 5% Divisional First Mortgage Bonds, which were secured by a Divisional First Mortgage on all the New Haven assets which had been transferred to Penn Central. The New Haven Trustee is the only holder of these Penn Central 5% Bonds.

4. The claim by the New Haven Committee is apparently based upon the following language in the Penn Central Divisional First Mortgage:

Section 10.09(a):

> "[A]ll cash and securities receivable from any and all sales or condemnations of Mortgaged Properties, plus any cash required to be paid by the Company to the Corporate Trustee pursuant to §10.08, shall be deposited with the Corporate Trustee and held by it as Deposited Cash and Securities."

Section 10.08(4):

> "[There shall also be deposited] [s]uch cash, if any, to be held by the Corporate Trustee as Deposited Cash and Securities as shall be equal to the excess of the fair value of the portion of the Mortgaged properties being released pursuant to section 10.01 over the fair value of the proceeds to be received, as shown by the officers' Certificate."

In view of our disposition of this appeal, we need not decide whether there is merit in the New Haven Committee's position (which apparently was first advanced and then compromised by the New Haven Trustee).

ceived by the Trustees from the MTA and the CTA.[5] Paragraph 4 of the order, however, appears to limit the Penn Central Trustees' obligations to the New Haven Trustee under the Divisional First Mortgage.[6] The New

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5. Presumably also reserved for future resolution was the issue raised by the New Haven Committee as to whether the 60-year lease to the CTA constitutes a sale within the meaning of the Penn Central Divisional First Mortgage. See footnote 4, *supra*.

Pending these determinations, the Penn Central Trustees were directed to deposit all cash consideration received with respect to property released from the Divisional First Mortgage lien with the Mortgage Indenture Trustee (¶3(a)) and to deposit other cash received pursuant to the Memorandum in a special bank account (¶3(b)). But see footnotes 6 & 20, *infra*.

6. Paragraph 4 of Order No. 63 declares as follows:

> "4. The obligations, if any, to be discharged by the Debtor's Trustees hereunder with respect to the claims of persons other than MTA and CTA are hereby limited to an amount which shall not exceed the sum of cash received from the sale of any property subject to the lien of the Divisional Mortgage leased to CTA pursuant to said lease plus annual rental payments as and when received by the Debtor's Trustees under said lease."

Because of our disposition of this appeal, we need not decide whether the limitation contained in this paragraph is appropriate. We note that the Penn Central Reorganization Court has an obligation to protect the interests of the creditors and the public interest. See *Penn Central Merger Cases*, 389 U.S. 486, 507-11 (1968); *New Haven Inclusion Cases*, 399 U.S. 392, 489-95 (1970). Section 77(o) of the Bankruptcy Act, 11 U.S.C. §205(o) declares that when the reorganization court orders the sale of property free from liens, the "proceeds derived from any such sales shall be received by the trustee . . . subject . . . to any liens thereon at the time of sale . . . ." Paragraph 2 of Order No. 63 appears consistent with the above-quoted language and paragraph 4 must be read in light of the other paragraphs of the order.

Order No. 147 of the Penn Central Reorganization Court dated January 26, 1971 (the substance of which was approved by the New Haven Reorganization Court on January 27, 1971, after a hearing on January 22, 1971), authorized the division between the Penn Central Trustees and the New Haven Trustee of approximately $18 million held by the Indenture Trustees of the Penn Central Divisional First Mortgage, which money included deposits made

Haven Committee objected to the entry of this order, largely because of the limitation contained in paragraph 4.[7] This appeal followed.[8]

A threshhold issue in this appeal involves the authority of the New Haven Committee to appeal the entry of Order No. 63 by the Penn Central Reorganization Court.[9] For the reasons to be stated, we conclude that the New Haven Committee is not authorized by the controlling bankruptcy statutes to prosecute this appeal. We there-

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pursuant to ¶3(a) of Order No. 63. The Penn Central Trustees contended that this division and distribution of funds permitted the continued operation of the Penn Central Railroad at a time when such operation was *in extremis* (N. T. 1133). See *In the Matter of Penn Central Transportation Co., Debtor, First Wisconsin National Bank, Appellant* (3rd Cir., Nos. 19,340-19,346, decided December 23, 1971), where Judge Hastie pointed out:

> "Even secured creditors of a railroad must submit to the risk inherent in judicial suspension of the rights they normally would have to enforce their liens against property of the debtor during the pendency of a reorganization proceeding. New Haven Inclusion Cases, 1970, 399 U.S. 392, 489-94."

See also Central RR. v. Manufacturers Hanover Trust Co., 421 F.2d 604 (3rd Cir. 1970). Further, the division of the $18 million between the New Haven Trustee and the Penn Central Trustees was in the nature of a settlement agreement (N. T. 1127-29, 1135 ff.) and such agreements, insofar as those participating in them are concerned, are favored by the law. See *Kelly v. Greer*, 365 F.2d 669, 671 (3rd Cir. 1966); *Main Line Theaters v. Paramount Film Distributing Corp.*, 298 F.2d 801 (3rd Cir.), *cert. denied*, 370 U.S. 939 (1962).

7. On October 27, 1970, the Penn Central Reorganization Court entered Order No. 72, which amended Order No. 63 to make it clear (1) that the New Haven Committee had not consented to Order No. 63, but (2) that no other party would be deemed to have agreed that the New Haven Committee had standing to object.

8. The New Haven Committee filed its Notice of Appeal on October 23, 1970; but did not seek either a stay of execution from the Penn Central Reorganization Court or a supersedeas from this court. Accordingly, on January 4, 1971, the transfers contemplated by the Memorandum were concluded.

9. On March 3, 1971, the Penn Central Trustees filed a motion in this court to dismiss the appeal of the New Haven Committee on the ground, *inter alia*, that it lacked standing to appeal. On May 4,

fore grant the motion made by the Penn Central Trustees to dismiss the appeal.[9]

The standing of a participant to a railroad reorganization to appeal from an order of the reorganization court turns on whether Section 77(c) (13) of the Bankruptcy Act, 11 U.S.C. §205(c) (13) (1964), grants him a right to be heard.[10] See *Horowitz v. Kaplan*, 193 F.2d 64, 66 (1st Cir. 1951); *In re Keystone Realty Holding Co.*, 117 F.2d 1003, 1005 (3d Cir. 1941). Section 77(c) (13) grants this right to be heard to the "debtor, any creditor or stockholder."[11] Thus the New Haven Committee is authorized to bring this appeal only if it is a "creditor" or a "stockholder" of the Penn Central as these terms are defined in the Bankruptcy Act.[12]

Note 9—*Continued*
1971, after the filing of briefs and oral argument, this motion was continued for disposition by the panel hearing the merits of the appeal.

10. The fact that the New Haven Committee was allowed to participate in the Penn Central Reorganization Court proceedings does not give rise to an automatic right of appeal. *See Peckham v. Casalduc*, 261 F.2d 120, 121 (1st Cir. 1958), *cert. denied*, 359 U.S. 958 (1959) (Chapter X Reorganization).

11. Section 77(c)(13) also provides that "upon petition therefor and cause shown . . . any other interested party may be permitted to intervene." The New Haven Committee, however, did not petition to intervene, so that it cannot claim a right to appeal as an intervenor. On the other hand, the failure to formally intervene will not preclude an appeal if the appellant in fact had a *right* to be heard in the reorganization proceedings. See *Horowitz v. Kaplan*, 193 F.2d 64, 66 (1st Cir. 1951).

12. The New Haven Committee has argued that the broad language respecting standing in several recent decisions of the Supreme Court, particularly *Data Processing Service v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968), supports its right to appeal the entry of Order No. 63. This language, however, was manifestly not intended to apply to a railroad reorganization proceeding, where Congress has enacted a specific statutory scheme which outlines the parties entitled to participate and provides a means by which an "interested party" may be permitted to intervene (see footnote 11, *supra*). *See Data Processing Service v. Camp*, 397 U.S. 150, 154, 157 (1970).

The New Haven appears to argue that it is a "creditor" of the Penn Central because of the very substantial interest which its members have in the property which the New Haven Trustee receives from the Penn Central. The members of the New Haven Committee are the holders of New Haven First Mortgage 4% Bonds which were outstanding at the time that the assets and operations of the New Haven were sold to Penn Central on December 31, 1968.[13] The transfer of assets to Penn Central, however, was made free of this mortgage lien, with the lien attaching to the proceeds of the sale held by the New Haven Trustee.[14] Thus the New Haven bondholders represented by the Committee have a lien on substantially all of the assets held by the New Haven Trustee, including the Penn Central 5% Divisional First Mortgage Bonds.[15] These New Haven bondholders, therefore, have a substantial derivative interest in assuring that the

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13. See footnote 1, *supra*.

14. After extensive negotiations and proceedings, the New Haven Reorganization Court on December 24, 1968, approved the release of the New Haven assets to the Penn Central pursuant to a plan of sale under which the transfers were to be substantially free and clear of all liens and encumbrances; these liens and encumbrances shifted to the proceeds of the sale and thereby remained an obligation of the New Haven estate. See *New Haven Inclusion Cases*, 399 U.S. 392, 410-16, 410 n. 45 (1970). This transfer of the liens and encumbrances from the assets themselves to the proceeds of sale is authorized by the following language of Section 77(o) of the Bankruptcy Act, 11 U.S.C. §205(o):

> "The judge may order and decree any sale of property . . . subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee . . . subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct."

15. The total price to be paid by Penn Central for the New Haven assets and operations has not yet been finally determined and is the subject of litigation which has already reached the Supreme Court. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970). Of course, the Committee has a very substantial interest in

terms of the mortgage which secures these bonds are complied with. Put in the simplest terms, the more cash that is deposited with the Mortgage Indenture Trustees when former New Haven assets are sold, the more likely it is that the Penn Central's obligations to the New Haven Trustee will be met, and therefore the more likely it is that the New Haven Committee bondholders will have their claims against the New Haven satisfied.

The relevant language of the Bankruptcy Act indicates, however, that Congress did not intend that those with simply a derivative interest in a railroad reorganization proceeding have a right to be heard and to appeal. *See Callaway v. Benton*, 336 U.S. 132, 139 (1949); *Boston & Providence Railroad Stockholders Development Group v. Smith*, 333 F.2d 651 (2d Cir. 1964). *Cf. Peckham v. Casalduc*, 261 F.2d 121 (1st Cir. 1958).[16] Section 77(b) of the Act, 11 U.S.C. §205(b), provides as follows:

> "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character *against the debtor or his property* . . . ." (emphasis added.)

This record requires the conclusion that the members of the New Haven Committee do *not* hold claims against either the Penn Central or the property of the Penn Central, as required by the language of Section 77(b). The lien which these New Haven bondholders once had on the

---

Note 15—*Continued*

the determination of this purchase price and, in fact, has actively participated in the New Haven Reorganization Court litigation. See 399 U.S. at 489-95.

16. Standing to appeal an order of a railroad reorganization court requires a direct personal interest in the subject matter of the order and a showing that the appellant is aggrieved or prejudiced by the order. *See, e.g., Comstock v. Thompson*, 158 F.2d 151 (8th Cir. 1946); *In Re Huntingdon & Broad Top Mt. RR. & Coal Co.*, 213 F.2d 411 (3rd Cir. 1954).

New Haven property (some of which Penn Central has transferred to the MTA and the CTA pursuant to Order No. 63) was explicitly released when this property was transferred to Penn Central on December 31, 1968.[17] Furthermore, the lien which the New Haven bondholders have against the proceeds of the sale to Penn Central[18] does not give them a claim against the Penn Central. The claim against the Penn Central for these proceeds is held by the New Haven Trustee; the New Haven bondholders have a claim only against the amounts which the New Haven Trustee receives from Penn Central. Thus, since the members of the New Haven Committee do not have claims either against Penn Central property or against the Penn Central, they are not "creditors" of Penn Central within the applicable language of the Bankruptcy Act and, therefore, had no automatic right either

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17. See pp. 7-8 and footnote 14, *supra*.

The New Haven Committee argues that it is not entirely clear that the New Haven property has finally passed to the Penn Central in view of the Supreme Court's decision that the Penn Central must pay more for this property than the amounts originally determined by either the I.C.C. or the New Haven Reorganization Court. The New Haven Committee argues that the New Haven Trustee now holds an "equitable lien" on the former New Haven property because the I.C.C. and the New Haven Reorganization Court may yet decide that the entire transaction (that is, the sale of the New Haven to Penn Central) should be undone and the property returned to the New Haven. But even if the New Haven Trustee has such an "equitable lien" on this property (see holding of New Haven Reorganization Court quoted at footnote 2 of *In the Matter of Penn Central Transportation Company, Debtor, Smith, Trustee, appellant,* F.2d (opinion of 1/3/72, 3rd Cir., Nos. 71-1582 and 71-1734)), it does not follow that the New Haven bondholders have a claim to the property within the meaning of Section 77(b) of the Act. As in the case of the claim to the proceeds of the sale of the New Haven assets to Penn Central (discussed below), the claim of the New Haven Committee is essentially derivative from the claim of the New Haven Trustee and thus does not fall within the terms of Section 77(b).

18. See footnote 3, *supra*.

to be heard in the Penn Central reorganization or to appeal the entry of Order No. 63.[19]

This result will effectuate the purposes of Section 77 of the Bankruptcy Act. If those with purely derivative interests in a railroad reorganization were allowed not only to participate in these proceedings but also to appeal from the resulting decisions, the already complicated and elaborate reorganization process developed by Congress might become hopelessly confounded. Further, there is no reason to believe that the New Haven Trustee will not adequately protect the interests of creditors of the New Haven, including the members of the New Haven Committee, in the Penn Central reorganization proceedings. Finally, we have held only that the New Haven Committee has no right to appeal from a decision reached in the Penn Central Reorganization Court. This is not to say, however, that the New Haven Committee was prevented from contesting the terms of the arrangement embodied in Order No. 63 in another, more appropriate forum.[20]

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19. The New Haven Committee has suggested that its members should be considered "stockholders" of the Penn Central because of the possibility that they will own all the stock of the New Haven. Even if this were to occur, however, it would not aid the Committee, since it is clear that the stockholders of a creditor are not themselves "creditors" within the meaning of Section 77(b). See *Callaway v. Benton*, 336 U.S. 132, 139 (1949).

20. For example, the New Haven Committee is a party to the New Haven reorganization proceedings and it might have initiated an action in that court to challenge the New Haven Trustee's agreement to the entry of Order No. 63 if it felt that this agreement violated the terms of the Penn Central Divisional First Mortgage. See footnotes 3 & 4, *supra*. Indeed, the appropriateness of this agreement was at least indirectly before the New Haven Reorganization Court at a hearing on January 22, 1971 sur Petition of Trustee For Approval of Agreement with Penn Central Trustees dated 1/20/71, reciting in paragraph 4 the agreement to divide the funds as stated in note 6 above, after which that court entered its Order No. 631 on 1/27/71 approving this agreement. The effect of Orders 631 and 147 (in which the Penn Central Reorganization Court approved this agreement on 1/26/71) was to modify ¶3(a)

For the foregoing reasons, we grant the Penn Central Trustees' motion to dismiss the appeal.

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of Order No. 63 to allow a distribution of the money held by the Mortgage Indenture Trustees (see footnotes 5 & 6, *supra*). The New Haven Committee, though a party to the New Haven reorganization proceedings, did *not* object to the court's approval of the agreement (see N.T. of 1/22/71 hearing).

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of the Court of Appeals

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 19,503

In the Matter of:
PENN CENTRAL TRANSPORTATION COMPANY, Debtor

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Appellant

(D. C. No. In Bankruptcy No. B-70-347)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, ROSEN, *Circuit Judges* and LAYTON, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal from Order No. 63 of the said District Court, filed September 29, 1970, be, and the same is hereby dismissed. Costs are taxed against the appellant.

ATTEST:

M. Elizabeth Ferguson,
Chief Deputy Clerk

January 27, 1972

Order No. 63

Authorizing Trustees to affirm a Memorandum of Intent among Metropolitan Transportation Authority, Connecticut Transportation Authority and the Debtor.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[SAME TITLE]

AND NOW, this 29th day of September, 1970, the petition of the Trustees of the Debtor's property in the above matter having come on for hearing, on notice duly given in accordance with the Order of notice, and the Court being fully advised in the premises and having noted the consent of all objecting participants therein to the form of order hereinafter set forth, it is ORDERED:

1. The Trustees are authorized to affirm the Memorandum of Intent described in the Petition for this Order;

2. The Trustees are authorized to negotiate and execute, subject to the approval of this Court, any instruments and contracts and to perform any acts necessary to implement the aforesaid Memorandum of Intent;

3. Jurisdiction is reserved in this Court to determine the valuation and disposition of the consideration received by the Trustees in the aforesaid transactions and to determine the respective rights of the Trustees and the objecting participants making claims with respect thereto. Pending such determination, the Trustees are directed:

Order Number 63 Authorizing Trustees to Affirm a Memorandum of Intent Among Metropolitan Transportation Authority, Connecticut Transportation Authority and the Debtor.

(a) to deposit with The Fidelity Bank and Joseph F. McDonald, as Trustees under an indenture from the Debtor dated as of December 31, 1968, securing 5% Divisional First Mortgage Bonds due January 1, 1994 (the Divisional Mortgage) all cash consideration received by the Debtor's Trustees specified to be with respect to land to be released from the lien of the Divisional Mortgage, and

(b) to deposit in a special bank account designated as pursuant to this Order consideration received for MU cars as specified in the Petition and as rental for the properties to be leased to CTA in Connecticut as specified in the Petition.

4. The obligations, if any, to be discharged by the Debtor's Trustees hereunder with respect to the claims of persons other than MTA and CTA are hereby limited to an amount which shall not exceed the sum of cash received from the sale of any property subject to the lien of the Divisional Mortgage leased to CTA pursuant to said lease plus annual rental payments as and when received by the Debtor's Trustees under said lease.

5. This Order is without prejudice to the rights of Debtor's Trustees and parties or persons having objected to the Trustees' Petition for this Order at the hearing thereon to seek the adjudication contemplated by Paragraph 3 hereof, *provided however*, that the liabilities and obligations of either MTA or CTA shall not be other than as are stated in the documents implementing the petition.

JOHN P. FULLAM,
JOHN P. FULLAM,
District Judge.

Order No. 72 Amending Order No. 63.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[SAME TITLE]

AND NOW, this 27th day of October, 1970, by agreement of counsel, Order No. 63 heretofore entered in this matter on September 29, 1970, is hereby amended to reflect the fact that the New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee did not consent, and has not consented, to the entry of Order No. 63.

By consenting to the entry of the foregoing amendment to Order No. 63, neither the Trustees nor any other party shall be deemed to have agreed that the said Bondholders Committee has, or ever had, standing to object to the entry of said Order No. 63.

JOHN P. FULLAM,
Justice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1384

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ as Trustees of the Property of the Penn Central Transportation Company and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

BRIEF FOR THE METROPOLITAN TRANSPORTATION AUTHORITY IN OPPOSITION

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May 1972

Washington, D. C. THIEL PRESS 202 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1384

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ as Trustees of the Property of the Penn Central Transportation Company and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

BRIEF FOR THE METROPOLITAN TRANSPORTATION AUTHORITY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 455 F.2d 811.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 13a) was entered on January 27, 1972. The petition for a writ of certiorari was filed on April 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that a party which was not a creditor or stockholder of the debtor railroad and did not seek permission to intervene in the reorganization proceedings was not authorized under the provisions of Section 77 of the Bankruptcy Act to appeal the entry of an order of the Reorganization Court.

STATUTES INVOLVED

The relevant provisions of Sections 77(b) and 77(c)(13) of the Bankruptcy Act, 11 U.S.C. 205(b) and 205(c)(13), are set forth at page 3 of the petition.

STATEMENT

Petitioner, the New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (the "New Haven Committee") is the representative of the first mortgage bondholders of The New York, New Haven and Hartford Railroad Company (the "New Haven"). The New Haven is and has been a debtor in reorganization under Section 77 of the Bankruptcy Act since July 7, 1961.

As a condition to approval by the Interstate Commerce Commission (the "Commission") of the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company into what is now the Penn Central Transportation Company (the "Penn Central"), the Commission required the inclusion of the New Haven

in the merged system, and substantially all of the assets and operations of the New Haven were sold to the Penn Central on December 31, 1968. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970). In addition to cash and Penn Central stock, a part of the consideration paid to the New Haven Trustee was an issue of Penn Central 5% Divisional First Mortgage Bonds, which were secured by a Divisional First Mortgage on all the New Haven assets transferred to the Penn Central. As approved by the United States District Court for the District of Connecticut (the "New Haven Reorganization Court"), the transfer of the New Haven's assets to Penn Central was to be substantially free and clear of all liens and encumbrances, with the liens and encumbrances shifting from the assets themselves to the proceeds of the sale, as authorized by Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205 (o).

The Penn Central itself filed for reorganization on June 21, 1970, in the United States District Court for the Eastern District of Pennsylvania (the "Penn Central Reorganization Court").

After extended negotiations, the Penn Central Trustees agreed to sell part of the former New Haven line in New York State to the Metropolitan Transportation Authority (the "MTA") and to lease some former New Haven lines in Connecticut to the Connecticut Transportation Authority (the "CTA"). On September 11, 1970, the Penn Central Trustees filed a petition requesting authority to affirm the Memorandum of Intent between the Penn Central Trustees and MTA and CTA. At a hearing on the petition held by the Penn Central Reorganization Court on September 23, 1971, the New Haven Trustee and the New Haven Committee appeared and objected to the conveyances contemplated by the Memorandum of Intent unless the Penn Central Trustees deposited with the Indenture Trustees of the Penn Central Divisional First Mortgage an amount in cash equal to the fair value of the properties transferred, not simply the cash which Penn Central was to receive in direct

payment for the transfer. After some discussion, the hearing was recessed to allow the parties to effect a compromise.

A settlement agreement was reached among all the parties except the New Haven Committee and was reflected in Order No. 63 of the Penn Central Reorganization Court dated September 29, 1970, which authorized the Penn Central Trustees to affirm the Memorandum of Intent, but reserved jurisdiction to determine the valuation and disposition of the consideration to be received by the Penn Central Trustees from the MTA and CTA. (Pet. App. 15a-16a) Order No. 72, amending Order No. 63, dated October 27, 1970, made it clear that the New Haven Committee did not consent to the entry of Order No. 63, but also stressed that by consenting to the amendment, neither the Trustees nor any other party would be deemed to have agreed that the New Haven Committee ever had standing to object to the entry of Order No. 63. (Pet App. 17a) The transaction was consummated early in January, 1971, and the cash paid by MTA and CTA was deposited with the Indenture Trustees of the Penn Central Divisional First Mortgage. By Order No. 147 of the Penn Central Reorganization Court dated January 26, 1971, which was approved by the New Haven Reorganization Court on January 27, 1971, the Penn Central Trustees and the New Haven Trustee were authorized to divide approximately $18 million held by the Indenture Trustees, which included the deposits made pursuant to Order No. 63.

The New Haven Committee filed its notice of appeal to the Court of Appeals on October 23, 1970, but did not seek either a stay of execution from the Penn Central Reorganization Court or a supersedeas from the Court of Appeals.

On March 3, 1971, the Penn Central Trustees filed a motion to dismiss the appeal of the New Haven Committee on the ground that it lacked standing to appeal.

On May 4, 1971, the motion was continued for disposition by the panel hearing the merits of the appeal. After briefs and oral argument by counsel for the New Haven Committee, the Penn Central Trustees and MTA, the Court of Appeals dismissed the appeal, concluding that "the New Haven Committee is not authorized by the controlling bankruptcy statutes to prosecute this appeal." (Pet. App. 5a)

ARGUMENT

The New Haven Committee advances two arguments in support of its petition: (1) that the Court of Appeals erroneously limited the principles enunciated by this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); and (2) that the Court of Appeals erroneously limited the definition of "creditor" under Section 77 of the Bankruptcy Act. Both arguments are completely lacking in merit.

Petitioner's reliance on the *Data Processing Service Case* is clearly misplaced. This Court made it clear that the principles enunciated in that case in favor of granting judicial review did not apply where a presumption against judicial review "is fairly discernible in the statutory scheme." (397 U.S. at 157) As this Court pointed out, "Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise. *Muskrat* v. *United States*, 219 U.S. 46." (397 U.S. at 154) In Section 77(c)(13) of the Bankruptcy Act, 11 U.S.C. 205(c)(13), Congress *has* specified the persons granted the right to be heard, and there is no constitutional question being raised in this case with regard to that section. The Court of Appeals was clearly correct in holding that the language in the *Data Processing Service Case* "was manifestly not intended to apply to a railroad reorganization proceeding." (Pet. App. 6a, footnote 12)

So far as the New Haven Committee is concerned, it would have the right to be heard only if it could properly

be considered as a "creditor or stockholder" or an interested party which has been permitted to intervene. Clearly, it does not qualify under any of the three categories. The New Haven Committee has not sought permission to intervene in the Penn Central reorganization proceeding, and the stock paid by Penn Central as part of the purchase price for the New Haven's assets is being held by the New Haven Trustee. The New Haven Committee is also clearly not a "creditor" holding a claim "against the debtor or its property" under the provisions of Section 77(b), 11 U.S.C. 205 (b).

As the Court of Appeals correctly pointed out, the transfer of the New Haven's assets to the Penn Central was made free and clear of the mortgage lien, with the lien attaching to the proceeds to be held by the New Haven Trustee, and the bondholders represented by the New Haven Committee thus have a lien on substantially all of the assets held by the New Haven Trustee. The New Haven Committee, however, is clearly not a "creditor" or "stockholder" of the Penn Central, as those terms are used in the Bankruptcy Act. (Pet. App. 6a-7a)

After satisfaction of the higher-priority claims such as administration expenses, trustees certificates, tax claims, etc., there will presumably be something left over in the New Haven estate for the bondholders represented by the New Haven Committee, so that it does have a "derivative interest" as the Court of Appeals found. (Pet. App. 7a) Such a derivative interest, however, clearly does not give the New Haven Committee standing to bring this appeal as a "creditor" or "stockholder" of the Penn Central.

The New Haven Committee did, of course, have an opportunity to challenge the involved transaction in the New Haven Reorganization Court, where it *is* a party. It could have asked that Court to prevent the New Haven Trustee from agreeing to the settlement, and it could have objected to the order permitting the division of the proceeds between the Penn Central Trustees and the New Haven Trustee. Instead, it stood mute. In now trying to

improve the terms of the transaction after the deal has been consummated and the proceeds distributed, the New Haven Committee has neither law not equity on its side.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1972

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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1384.

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, Trustees of the Property of the Penn Central Transportation Company,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The Opinion of the Court of Appeals set forth in the Appendix to the Petition for Writ of Certiorari commencing at page 1a has been reported at 455 F.2d 811.

COUNTER STATEMENT OF QUESTION PRESENTED.

Whether a committee representing bondholders of The New York, New Haven and Hartford Railroad Company (New Haven) has standing to appeal from an order in the reorganization proceedings of the Penn Central Transportation Company (Debtor) authorizing the sale of the Debtor's property free of a mortgage in favor of the New Haven, which sale was consented to by the mortgage indenture trustees and the reorganization trustee of the New Haven (New Haven Trustee)?

COUNTER STATEMENT OF THE CASE.

The instant matter arises out of the dismissal by the United States Court of Appeals for the Third Circuit (Court of Appeals) of the appeal taken by the petitioner, New Haven First Mortgage 4% Bondholders Committee (Committee), from Order No. 63 of the United States District Court for the Eastern District of Pennsylvania (Reorganization Court) in the Debtor's reorganization proceedings under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, on the ground of lack of standing to appeal.

Order No. 63 of the Reorganization Court authorized the Trustees of the property of the Debtor (Penn Central Trustees) to affirm a Memorandum of Intent with the Metropolitan Transportation Authority (MTA) and the Con-

necticut Transportation Authority (CTA) relating to suburban commuter service in the New York metropolitan area (App. 15a-16a).[1] The said memorandum provided, *inter alia*, for the sale to MTA of the Debtor's properties between Woodlawn Junction, New York City, and the border of the States of New York and Connecticut at Port Chester, New York. The stated consideration to be paid by MTA was $7,200,000. In addition, the memorandum provided for a lease of commutation facilities in the State of Connecticut to CTA for a period up to 60 years (App. 2a).

The purpose of the parties in entering into the Memorandum of Intent was to improve commutation service between New York City and the suburban areas of New York and Connecticut subject to the sale and lease arrangements. It was not disputed in the proceedings below that the consummation of the Memorandum of Intent would be in the public interest, and would be beneficial to the Debtor's estate.

The property subject to the Memorandum of Intent was conveyed to the Debtor on December 31, 1968, by the New Haven Trustee (App. 2a, fn. 1).[2] As part of the price for the conveyance, the New Haven Trustee received, and still holds, bonds secured by a 5% Divisional First Mortgage (Penn Central Divisional First Mortgage) on certain former New Haven assets, including the property sold to MTA and leased to CTA (App. 3a, fn. 3).

The Memorandum of Intent with MTA and CTA was entered into, but not consummated, prior to the filing of

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1. References to "App." are to the appendix attached to Petitioner's Petition in this Court; references to Rec. are to the Appendix filed by Petitioner in the Court of Appeals.

2. The New Haven, as the Debtor, is a railroad in reorganization proceedings under Section 77 of the Bankruptcy Act, the New Haven proceedings being in the United States District Court for the District of Connecticut.

Debtor's petition for reorganization under Section 77 of the Bankruptcy Act. Thereafter, the Penn Central Trustees reviewed the Memorandum of Intent and concluded it was in the best interests of the Debtor's estate. Accordingly, they petitioned the Reorganization Court, for authority to implement the Memorandum (Rec. 2-7).

To convey good title to the property sold to MTA, it was necessary to transfer the property free and clear of the lien of the mortgage in favor of the New Haven. Under Section 77(o) of the Bankruptcy Act, 11 U.S.C. § 205(o), property may be sold free and clear of such liens, the lien attaching to the proceeds of the sale.

At the hearing on the petition relating to the Memorandum of Intent, appearances were entered, among others, on behalf of the New Haven Trustee, the Indenture Trustees under the Penn Central Divisional First Mortgage (Indenture Trustees) and the Committee (App. 2a). The Committee is a committee of holders of bonds issued by the New Haven prior to its own reorganization. The bonds, which are not the Penn Central Divisional First Mortgage Bonds presently held by the New Haven Trustee, were formerly secured by a lien on New Haven assets, including the property sold to MTA. When those assets were transferred to the Debtor on December 31, 1968, the property was conveyed free and clear of prior mortgage liens.[3] The Committee has not sought leave to intervene generally in the Debtor's reorganization proceedings.

During the course of the hearing, the New Haven Trustee voiced no opposition to the sale to MTA. He did, however, request The Reorganization Court to reserve jurisdiction to require, after some future determination, additional cash deposits under the mortgage securing bonds issued to the New Haven in the event it was held that the

3. See New Haven Inclusion Cases, 399 U.S. 392 (1970).

consideration for the sale exceeded the $7.2 million cash received (Rec. 14-20). The Committee also felt that the amount received in cash was less than "fair value" under the mortgage;[4] its position was somewhat different from the New Haven Trustee's, in that it urged the matter of additional cash deposits be resolved *before* the sale was made (Rec. 20). The Indenture Trustees supported the New Haven Trustee's position, but did not indicate whether the sale should be deferred pending determination of fair value (Rec. 26).

The position of the Penn Central Trustees was that the transaction could not go forward despite its obvious benefits to the estate and the public interest, if the estate were to be exposed "to an open-ended claim by the New Haven Trustee for additional moneys . . ." (Rec. 27).

The Reorganization Court recessed the hearing to permit the parties to attempt a compromise (App. 3a). The compromise, which was reached with the New Haven Trustee, was reflected in Order No. 63.[5] By Order No. 72, the

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4. Specifically, it was the Committee's position that the capitalized value of the deficits from commuter operations which the Debtor would avoid in the future by reason of the sale should be included in a determination of the fair value of the consideration. From that premise, the Committee requested that the Debtor deposit with the Indenture Trustees cash equal to the capitalized value of the deficits.

5. Order No. 63 authorized the Penn Central Trustees to affirm the Memorandum of Intent (paragraph 1) and directed that the cash consideration from the sale to MTA be deposited with the Indenture Trustees (paragraph 3(a)). The Reorganization Court reversed jurisdiction to determine the valuation and disposition of the consideration received by the Penn Central Trustees and to determine the respective rights of the parties thereto (paragraph 3), subject to the provision that the Debtor's obligation to discharge any obligation to the New Haven Trustee (over the cash consideration received from MTA) was to be limited to the sum of the cash consideration to be received from the sale of any property leased to the CTA plus the annual rental payments from the CTA (paragraph 4), which rentals were to be deposited in a special bank account pending the Court's determination (paragraph 3(b)) (App. 15a-16a).

Reorganization Court recognized that the Committee had not consented to the compromise, at the same time noting that there was no waiver of objections to the Committee's standing in the Reorganization Court (App. 17a).

On October 23, 1970, the Committee filed a Notice of Appeal from Order No. 63, but did not seek and never obtained either a stay of the execution of the Order from the Reorganization Court or a supersedeas from the Court of Appeals (App. 5a, fn. 8).

On January 4, 1971, the sale of the Debtor's property to MTA was consummated and the proceeds from the sale deposited with the Indenture Trustees. Subsequently, on January 26, 1971, the Reorganization Court, by Order No. 147 entered after notice and hearing, approved a settlement agreement between the Penn Central Trustees and the New Haven Trustee, whereby the approximately $18 million then on deposit with the Indenture Trustees, including the proceeds of the sale to MTA, would be paid out by the Indenture Trustees and divided equally between the two parties (App. 4a-5a, fn. 6).[6]

On January 27, 1971, after notice given, a hearing was held before the Honorable Robert P. Anderson, presiding over the proceedings for the reorganization of the New Haven, for the purpose of approving the aforesaid agreement between the Trustees of the respective railroads in reorganization. The Committee was represented at that hearing by its attorneys, and did not object to such approval being given. As a consequence, the agreement was approved and the proceeds of the MTA transaction were distributed in accordance therewith (App. 4a, fn. 6).

The Penn Central Trustees thereupon moved the Court of Appeals to dismiss the Committee's appeal on the

6. Events subsequent to the entry of Order No. 72 were before the Court of Appeals in the form of an affidavit attached to Appellees' Motion to Dismiss the Appeal.

grounds, *inter alia*, of lack of standing and mootness. Although this motion was argued preliminary before a panel of the Court of Appeals on May 4, 1971, the issues raised thereby were continued for disposition by the panel of the Court which was to hear argument on the merits of the appeal (App. 5a-6a, fn. 9).

After full argument with respect to all of the questions presented by the Committee's appeal and the motion to dismiss held on November 9, 1971, the Court of Appeals entered a judgment dismissing the appeal (App. 13a).

In the opinion of the Court of Appeals, the Committee was not a creditor or stockholder of the Debtor within the meaning of Section 77(c)(13) of the Bankruptcy Act, 11 U.S.C. § 205(c)(13), authorizing participation in railroad reorganization proceedings, and thus had no standing to appeal from the decision of the Reorganization Court made in the course of such proceedings. The Court of Appeals noted that the Committee's claim was not against the Debtor or the Debtor's property, which had been acquired from the New Haven Trustee free of the lien of the New Haven 4% mortgage, but against the New Haven Trustee and the bonds issued to the New Haven Trustee under the Penn Central Divisional First Mortgage in partial consideration for the transfer of the New Haven property to the Debtor. It further held that the Committee's indirect derivative interest in the Penn Central Divisional First Mortgage as a result of its claim against the bonds thereunder in the possession of the New Haven Trustee did not give the Committee the right to be heard or to appeal in the Debtor's reorganization proceedings. In support of this holding, the Court concluded (App. 10a):

> ". . . . This result will effectuate the purposes of Section 77 of the Bankruptcy Act. If those with purely derivative interests in a railroad reorganization were

allowed not only to participate in these proceedings but also to appeal from the resulting decisions, the already complicated and elaborate reorganization proceess developed by Congress might become hopelessly confounded. Further, there is no reason to believe that the New Haven Trustee will not adequately protect the interests of creditors of the New Haven, including the members of the New Haven Committee, in the Penn Central reorganization proceedings. . . ."

It is the position of the Penn Central Trustees that the ruling of the Court of Appeals is correct, as well as consistent with the decision of this Court, and should not be reviewed by this Court. The general interests of the Committee, insofar as they arise out of the Committee's claims against the New Haven, have been and will continue to be adequately represented in the Debtor's reorganization proceedings by the New Haven Trustee and the ruling of the Court of Appeals denying the Committeee the right to appeal is not prejudicial to these interests and does not otherwise involve an important question of federal law requiring consideration by this Court.

REASONS FOR DENYING THE WRIT.

The Matter Was Correctly Decided by the Court of Appeals.

A. The Committee Is Not a Creditor of the Debtor.

As noted by the Court of Appeals, the mere fact that the Committee was permitted to participate in the hearing in the Reorganization Court does not confer standing to appeal from the Court's decision absent a right to be heard in the proceeding. *Peckham v. Casalduc*, 261 F.2d 120, 121 (1st Cir. 1958), *cert. denied*, 359 U.S. 958 (1959); *In re South Street Bldg. Corp.*, 140 F.2d 363, 366 (7th Cir. 1943), *cert. denied*, 322 U.S. 761 (1944). The right of a party to be heard in a railroad reorganization proceeding and thus to appeal is governed exclusively by Section 77(c)(13) of the Bankruptcy Act,[7] which provides in pertinent part as follows:

> ". . . . The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and upon petition therefor and cause shown any such person or any other interested party may be permitted to intervene. . . ."

The Committee has never sought to intervene in the Debtor's reorganization and therefore has no standing to

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7. Peckham v. Casalduc, 261 F.2d 120 (1st Cir. 1958), cert. denied, 359 U.S. 958 (1959); Horowitz v. Kaplan, 193 F.2d 64 (1st Cir. 1951); In re Keystone Realty Holding Co., 117 F.2d 1003 (3d Cir. 1941).

appeal as an intervenor.[8] It is further not contended herein, as it was in the Court of Appeals, that the Committee is an indirect stockholder of the Debtor entitling it to appeal in that capacity. The Committee's standing to appeal under the Bankruptcy Act is based herein, as it must be, on the argument that the Committee represents "creditors" of the Debtor within the meaning of that term as used in Section 77(c)(13).

Section 77(b) of the Bankruptcy Act, 11 U.S.C. § 206(b), defines the term "creditor" as including ". . . all holders of claims of whatever character against the debtor or his property. . . ." The Committee concedes that it no longer has a lien against the former New Haven property transferred to the Debtor and has no other direct claim against the Debtor or its property. It argues, nonetheless, that Section 77(c)(13) of the Bankruptcy Act should be interpreted as permitting ". . . any person likely to be economically affected by the reorganization proceedings to be considered as a 'creditor'", and that it was so affected, albeit indirectly and derivatively, as result of its rights with respect to the Penn Central Divisional First Mortgage bonds held by the New Haven Trustee.

This construction of the statute is without support either in the statutory language or in any judicial decision. On the contrary, the Federal Courts have denied participation in reorganization proceedings to parties having only a derivative interest in the property of the Debtor, *Boston & Providence Railroad Stockholders Development Group v. Smith*, 333 F.2d 651 (2d Cir. 1964); see also *Callaway v. Benton*, 336 U.S. 132, 139 (1949), and have required a

8. Because the New Haven interests are fully represented in the Debtor's reorganization proceedings by the New Haven Trustee and the Indenture Trustees under the Penn Central Divisional First Mortgage, sound judicial administration would have required a denial of any application by the Committee to intervene.

direct personal interest in the subject matter of an order of the reorganization court as a condition to a party's standing to appeal from the order, see, *e.g.*, *Comstock v. Thompson*, 158 F.2d 151 (8th Cir. 1946); *In Re Huntingdon & Broad Top Mt. R.R. & Coal Co.*, 213 F.2d 411 (3d Cir. 1954).

As a general rule, the direct personal interest in the aspects of the Debtor's reorganization relating to The New Haven, including the subject matter of the instant order, lies not in the Committee, or any other claimant of the New Haven, but in the New Haven Trustee. That Trustee, contrary to the Committee's assertion, is more than ". . . simply a fiduciary appointed . . . to conduct proceedings in reorganization" (Petition, p. 13), but is authorized and obligated to represent and protect the interests of all creditors of the New Haven. He has heretofore adequately protected the Committee's interest in the Debtor's reorganization proceedings,[9] and, it must be assumed, will continue

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9. The settlement agreement between The Penn Central Trustees and the New Haven Trustees giving rise to Order No. 63, was a compromise of several conflicting interests: The public interest in preserving and improving essential, but unprofitable, commutation operations serving New York City; The New Haven interest in securing protection if, as the New Haven Trustee contended, there was value, recognizable under the mortgage, in the transaction over and above the $7,200,000 being paid by MTA for sale of the properties; and the Penn Central Trustees' interest in stopping the commuter deficits as soon as possible without exposure to an open-ended claim of many millions of dollars by the New Haven Trustee if his contentions were upheld.

Order No. 63 permitted MTA/CTA to acquire the Commuter operations immediately without further liability, and limited the Penn Central Trustees' obligation, if any, to pay additional sums to the Indenture Trustees, if the New Haven Trustee's contentions were sustained, to the rent received from the CTA lease, plus the proceeds thereafter realized from the sale of properties subject to the lease.

The New Haven Trustee, on the other hand, for the benefit of the New Haven estate, secured the necessary time to prepare valuation evidence in support of the contention that the value received by the Penn Central Trustees was greater then the cash consideration and the assurance that the substantial rental payments from CTA—

to do so in the future. *In re Huntingdon & Broad Top R.R. & Coal Co., supra.* The right to participate and to appeal from any order therein affecting the former New Haven property must be limited, therefore, to the New Haven Trustee.[10] If the New Haven Trustee fails in this obligation, the Committee can secure relief in the New Haven reorganization proceedings, which remain pending in the United States District Court for the District of Connecticut and in which the Committee is a party (App. 10a-11a, fn. 20).

To hold otherwise in the context of these proceedings would permit the participation in the Debtor's reorganization of not only the Committee, but of all other creditors and claimants of the New Haven who also have an interest in the Penn Central Divisional First Mortgage bonds held by the New Haven Trustee. Such a result would turn the

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approximately $800,000 per year for 60 years—which the Penn Central Trustees contended were not depositable with the Indenture Trustees under the Penn Central Divisional First Mortgage, would be available in the event he succeeded.

An agreement has subsequently been entered into between the Penn Central Trustees and the New Haven Trustee as to the disposition of the rental payments heretofore paid by CTA and deposited under Order No. 63 and to be paid in the future. This agreement will be submitted for approval in both the Penn Central and New Haven reorganization proceedings.

10. The decision of the Court of Appeals in limiting the right to appeal from orders in the Penn Central reorganization proceedings involving the New Haven interests generally to the New Haven Trustee has not ". . . created rigid and arbitrary requirements for the determination of standing . . ." (Petition, p. 14). On the contrary, the Court of Appeals has permitted the Committee to maintain separate appeals from orders of the Reorganization Court which directly affect the Committee (*i.e.*, injunction orders), as distinguished from the New Haven interests in general, where the New Haven Trustee may not be able adequately to represent the Committee's rights. In the matter of: Penn Central Transporation Company, Debtor, The New York, New Haven & Hartford Railroad Company, First Mortgage 4% Bondholders Committee, Appellant, United States Court of Appeals for the Third Circuit, Docket Nos. 72-1172, 1173 and 1174 (Order denying Motion to Dismiss Appeals.)

Debtor's reorganization into a town meeting and would cause procedural chaos, contrary to the purposes of Section 77 of the Bankruptcy Act.

The Court of Appeals thus correctly interpreted Section 77(c)(13) of the Bankruptcy Act as limiting the right to be heard and to appeal in a railroad reorganization proceeding to direct claimants of the Debtor, and its decision dismissing the Committee's appeal for lack of standing on the basis of this interpretation should not be reviewed by this Court.

B. The Principles Enunciated in *Data Processing Service v. Camp*, 397 U.S. 150 (1970), Are Not Applicable to These Proceedings.

The Committee has contended in the alternative that its standing to appeal from the order of the Reorganization Court does not derive exclusively from the provisions of Section 77(c)(13) of the Bankruptcy Act, but should also be considered under the principles enunciated in *Data Processing Service v. Camp*, 397 U.S. 150 (1970). That decision sets forth the standards to be applied in determining the standing of a party to institute suit generally under the broad framework of Article III of the United States Constitution, in the absence of any statutory specification, and expressly reserves to Congress (397 U.S. at 154) the authority to establish more stringent standards as to standing under a particular statute, insofar as consistent with Article III.

Congress, in Section 77(c)(13) has enumerated the parties entitled to participate in a railroad reorganization as of right and provided a means for other interested parties to intervene. This specification is extensive in its coverage and was obviously intended to state the exclusive guideline with respect to standing in railroad reorganiza-

tion. *Peckham v. Casalduc, supra.* It conforms, moreover, to the requirements to Article III of the United States Constitution as stated in the *Data Processing* opinion, and constitutes a proper exercise of the legislative discretion in this respect.

Indeed, as was acknowledged by the Court of Appeals, the legislative restrictions placed on the parties permitted to be heard in railroad reorganizations are necessary to prevent these already complicated proceeds from becoming hopelessly confounded. Under these circumstances, the Court of Appeals properly limited its consideration as to standing to an analysis of Section 77(c)(13) of the Bankruptcy Act and did not err in holding that the principles enunciated in *Data Processing Service v. Camp* were not applicable to the instant matter.

CONCLUSION.

For the above reasons, it is submitted that the decision of the Court of Appeals dismissing the Committee's appeal was a correct determination of a federal question which need not be reviewed by this Court. The Committee's Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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